BRB No. 09-0482 BLA

GERALD R. JONES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 01/28/2010
	)	
CENTURY OPERATIONS, LLC	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

H. Brett Stonecipher (Ferreri & Fogle), Lexington, Kentucky, for employer.

Sarah M. Hurley (Deborah Greenfield, Acting Deputy Solicitor; Rae Ellen Frank James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (2007-BLA-05871) of Administrative Law Judge Donald W. Mosser, with respect to a claim filed on July 6, 2006, pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act). After crediting claimant with at least twenty-eight years of coal mine employment, based on the stipulation of the parties, the administrative law judge adjudicated this claim pursuant to the regulations

contained in 20 C.F.R. Part 718. The administrative law judge found that claimant did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4) or a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's determination that he did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and total disability at 20 C.F.R. §718.204(b)(2)(i)-(iv). Claimant also argues that, based on the administrative law judge's finding at 20 C.F.R. §718.202(a)(4), he was not provided with a complete pulmonary evaluation pursuant to 20 C.F.R. §725.406. Further, claimant maintains that the administrative law judge erred in allowing employer to submit two readings of the x-ray dated September 5, 2006. Employer responds urging affirmance of the administrative law judge's denial of benefits. In his limited brief, the Director, Office of Workers' Compensation Programs (the Director), states that employer complied with the evidentiary limitations at 20 C.F.R. §725.414 and that remand is not required, based on the administrative law judge's finding that the record contains no evidence of total disability at 20 C.F.R. §718.204(b).[1]

The Board's scope of review is defined by statute. The administrative law judge's findings must be affirmed if they are rational, supported by substantial evidence, and in accordance with applicable law.[2] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc*., 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

[1] We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment determination and his finding that claimant did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2), (3). *Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

[2] The record reflects that the miner's last coal mine employment was in Kentucky. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Upon review of the Decision and Order, the evidence of record and the arguments on appeal, we affirm the administrative law judge's finding that claimant did not establish total disability at 20 C.F.R. §718.204(b), as it is rational and supported by substantial evidence. In making his findings at 20 C.F.R. §718.204(b), the administrative law judge considered the results of claimant's September 5, 2006 pulmonary function and blood gas studies and the medical opinions of Drs. Rasmussen and Broudy.

Since neither the pulmonary function study nor blood gas study results produced qualifying values, the administrative law judge found that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(ii). Decision and Order at 8. In addition, as there was no evidence of cor pulmonale or heart failure in the record, the administrative law judge found that total disability was not established at 20 C.F.R. §718.204(b)(2)(iii). *Id*. Further, in evaluating the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge noted that both Drs. Rasmussen and Broudy opined that claimant is not totally disabled from performing his previous coal mine employment, based on the objective test results. *Id*.; *see* Director's Exhibits 12, 15. Because he found both opinions to be well-reasoned and rational, the administrative law judge concluded that the weight of the evidence did not establish that the miner is totally disabled at 20 C.F.R. 718.204(b)(2). Decision and Order at 8.

On appeal, claimant states that "[i]t can be reasonably concluded that [his] regular coal mining duties involved [him] being exposed to heavy concentrations of dust on a daily basis." Claimant's Brief at 6. Therefore, claimant asserts that, when considering his condition against such duties, it is rational to find that his condition prevents him from performing his previous coal mine employment because it occurred in a dusty environment with daily exposure to coal dust. In addition, claimant argues that because pneumoconiosis is a progressive and irreversible disease, which was initially diagnosed several years ago, it can be concluded that he has become totally disabled. Employer responds, arguing that the medical evidence does not support a finding of total disability because neither the pulmonary function study nor blood gas study results were qualifying and both Drs. Rasmussen and Broudy agreed that claimant has the pulmonary capacity to perform his previous coal mine employment.

We reject claimant's contentions as he does not provide any support for his assertions and there is no evidence in the record that claimant has a pulmonary impairment. Consequently, we affirm the administrative law judge's findings at 20 C.F.R. §718.204(b), as they are rational and supported by substantial evidence. As the administrative law judge accurately found, the results from claimant's September 5, 2006 pulmonary function study and blood gas study were non-qualifying and there was no evidence of cor pulmonale with right-sided congestive heart failure. Therefore, the administrative law judge rationally determined that total disability was not established at 20 C.F.R §718.204(b)(2)(i)-(iii). Further, since both Drs. Rasmussen and Broudy opined

that claimant retained the pulmonary capacity to perform his previous coal mine employment, the administrative law judge properly determined that total disability was not established at 20 C.F.R. §718.204(b)(2)(iv). *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 12 BLR 2-121 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983).

We also reject claimant's contention that pneumoconiosis is a progressive disease that must have worsened, thus affecting his ability to perform his usual coal mine employment. An administrative law judge's finding on the issue of total disability must be based solely upon the medical evidence of record. *White v. New White Coal Co., Inc.*, 23 BLR 1-1 (2004). Based upon claimant's failure to establish total disability, a requisite element of entitlement under 20 C.F.R. Part 718, an award of benefits is precluded.[3] *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

[3] In light of this disposition, we need not address claimant's allegations of error regarding the administrative law judge's evidentiary rulings and her findings regarding the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4). *Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). In addition, because we have affirmed the administrative law judge's finding that claimant is not totally disabled pursuant to Section 718.204(b)(2), we consider claimant's request that we remand the case to the district director for a complete pulmonary evaluation, on the issue of the existence of pneumoconiosis, to be moot.

Accordingly, the administrative law judge's Decision and Order – Denying Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge